National Labor Relations Board



Weekly Summary of NLRB Cases

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(Note to subscribers: The Board did not issue any published decisions this week.)

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DECISION OF ADMINISTRATIVE LAW JUDGE

Flagstaff Medical Center Inc. (Communications Workers Local 7019) Flagstaff, AZ May 20, 2009. 28-CA-21509, et al.; JD(SF)-19-09, Judge Gerald A. Wacknov.

LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board adopted Reports of Regional Directors or Hearing Officers in the absence of exceptions)

DECISION AND CERTIFICATION OF REPRESENTATIVE

Elmhurst Care Center, East Elmhurst, NY, 29-RC-09431, May 18, 2009.

(In the following cases, the Board denied requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders of Regional Directors)

Bryant and Stratton College, Inc., Syracuse, NY, 3-RC-11892, May 20, 2009. Chairman Liebman and Member Schaumber.

JCIM, LLC, Kentwood, MI, 7-RD-03634, May 20, 2009. Chairman Liebman and Member Schaumber.

ORDER CORRECTING [Decision and Order remanding to the Regional Director for Further Appropriate Action]

Tully Construction Co., Inc., Flushing, NY, 29-RC-11706, May 19, 2009.

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Statement of Chairman Wilma B. Liebman and Member Peter C. Schaumber Concerning the District of Columbia Circuit's <u>Laurel Baye Healthcare</u> Decision

After very careful consideration, we have determined that, as a quorum of the National Labor Relations Board, we will continue to issue decisions and orders in unfair labor practice and representation cases. While a recent panel decision of the United States Court of Appeals for the District of Columbia Circuit held that we lack the authority to do so, two appellate courts have upheld our authority, and the issue is pending before seven other Circuits. Our original determination to act as a two-member Board was supported by a legal opinion that the Board earlier had sought from the Department of Justice's Office of Legal Counsel.

We believe that the Board has an important public duty to keep functioning, and to avoid an indefinite shutdown in its decision-making, where (as here) there is a reasonable legal basis for concluding that the Board can act. We remain convinced, as the First Circuit and Seventh Circuits have held, that such a basis for action exists under our statute. And we believe that by continuing to act on cases, we will be able to finally resolve a substantial number of those disputes. The parties in many cases that have been decided by the Board have accepted the Board's decisions. In other cases, while the merits of the Board's decision have been challenged, the authority of the Board, as now constituted, to act has not been attacked.

With great respect for the District of Columbia Circuit Court and the panel that decided *Laurel Baye Healthcare*, we believe that the panel decision was incorrect. Accordingly, we intend, by the end of May, to petition the panel, and the full Court, to revisit the panel's ruling.

Our decision not to adhere to the District of Columbia Circuit's ruling is consistent with the traditional policy of the Board. Historically, the Board, in selected cases, has chosen to adhere to its view of the law, where it respectfully disagrees with an appellate court's adverse decision. This step enables the Board's position to be presented to other Circuits and, where appropriate, to the Supreme Court.

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STATEMENT OF CHAIRMAN WILMA B. LIEBMAN ON THE NLRB'S DISPUTE WITH THE NLRBU

I have been advised by the General Counsel that the Solicitor General of the United States has authorized a legal challenge to a recent decision of the Federal Labor Relations Authority in a case involving the National Labor Relations Board Union, which represents staff members of the agency.

As Chairman of the Board, I have been pressed by the NLRBU to intervene in this dispute. I have declined to do so because I believe the crux of the dispute involves the statutory authority of the General Counsel, who, under the law, is independent of the Board.

It is important to understand that the dispute centers on the very limited issue of *how* NLRB employees should be grouped for purposes of collective bargaining. There is absolutely no dispute about *whether* NLRB employees have a right to union representation and, for many years, both the Board and the General Counsel have recognized and bargained with the NLRBU and a second staff union, the National Labor Relations Board Professional Association. We continue to do so.

The current dispute arose because the NLRBU sought to change the historical bargaining arrangement by combining employees of the two separate and statutorily independent parts of the Agency (the Board and the General Counsel) into one, consolidated bargaining unit. It is my understanding that the NLRBU was prompted to seek consolidation because of an FLRA ruling, binding on the Board, that prohibited the Board from granting official time across bargaining-unit lines: i.e., from paying Board employees in one unit for engaging in union-representational work on behalf of employees in a different unit.

The General Counsel opposed the unit-consolidation sought by the NLRBU because, in his view, it was inconsistent with our own statute, the National Labor Relations Act, which strictly separates the functions of the General Counsel, who serves as the Agency's prosecutor, and the Board, which functions as the Agency's adjudicator. The law also specifically provides that the General Counsel, not the Board, is the supervisor of certain NLRB employees.

The NLRBU took this matter to the Federal Labor Relations Authority, which ultimately sided with the union's view of the proper bargaining unit. Like NLRB decisions, however, FLRA decisions are subject to review by the federal appellate courts when a party believes the matter has been wrongly decided. Refusing to bargain is the mechanism for obtaining judicial review. This is what the General Counsel has done – but only with respect to the consolidated unit certified by the FLRA, as opposed to the historically separate units. Based on her own independent review of the matter, in turn, the Solicitor General has authorized the filing of a petition for review with the United States Court of Appeals for the District of Columbia Circuit.

Whether or not the General Counsel's legal position is ultimately found to be correct, I believe that he has taken that position in good faith and raised a legitimate legal question. Moreover, I do not believe the statute gives the Board as a body -- much less the Chairman as an individual official -- the authority to order the independent General Counsel *not* to take steps intended to preserve his own statutory authority. For these reasons, I have concluded that, as Chairman, I must await a final, legal resolution of this matter by the federal appellate courts.

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